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5 UNITED STATES DISTRICT COURT  
6 WESTERN DISTRICT OF WASHINGTON  
7 AT SEATTLE

8 COSTCO WHOLESALE CORPORATION,

9 Plaintiff,

10 v.

11 ARROWOOD INDEMNITY COMPANY,

12 Defendant.  
13

NO. C17-1212RSL

ORDER GRANTING IN PART  
PLAINTIFF'S MOTION TO FILE  
UNDER SEAL

14 This matter comes before the Court on "Plaintiff Costco's Motion to File Under Seal" an  
15 unredacted version of its motion for summary judgment and certain exhibits in support of that  
16 motion. Dkt. # 61. Costco argues that the documents are protected by the attorney-client  
17 privilege or work product doctrine, were prepared for mediation purposes in the underlying  
18 litigation, and/or are the subject of a confidentiality agreement. Defendant Arrowood Indemnity  
19 Company, whom Costco has sued to recover the fees and costs incurred in settling the  
20 underlying litigation, opposes the seal with the exception of a single document, Exhibit 54 to the  
21 Declaration of Nicholas Brown (Dkt. # 66 at 209-10), which contains medical information  
22 regarding one of Arrowood's employees.  
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25 Costco filed this lawsuit in July 2017 seeking a declaration that Arrowood has a duty to  
26 insure under an excess insurance policy issued by its predecessor in interest, Royal Insurance  
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28 ORDER GRANTING IN PART PLAINTIFF'S  
MOTION TO FILE UNDER SEAL - 1

1 Company of America. Throughout the underlying litigation and settlement, Costco shared  
2 information - including its attorneys' summaries of the claims against it, the parties' settlement  
3 negotiations, the relative positions of the parties, and the prospects for a negotiated resolution -  
4 with its insurers. An insured is contractually obligated to cooperate with and provide notice to  
5 the insurer if it hopes to obtain the benefits of an insurance policy. Under both Fed. R. Civ. P.  
6 26(b)(4) and Washington law, statements by an insured to its insurer in anticipation of litigation  
7 and/or in the hopes of obtaining a defense are generally protected by the work product doctrine.  
8 Heidebrink v. Moriwaki, 104 Wn.2d 392, 400-01 (1985).

10 Arrowood argues that Costco waived any protections that may have applied to its  
11 communications with the underlying insurers when it filed this lawsuit and put the protected  
12 communications at issue. A waiver occurs when "(1) the assertion of the privilege was the result  
13 of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative  
14 act, the asserting party put the protected information at issue by making it relevant to the case;  
15 and (3) application of the privilege would have denied the opposing party access to information  
16 vital to its defense." Pappas v. Holloway, 114 Wn.2d 198, 207-08 (1990). The third prong of the  
17 analysis is not satisfied here. Costco has not refused to produce the communications to  
18 Arrowood or otherwise denied it access to information it needs to defend itself in this litigation.  
19 Rather, Costco appropriately produced the information it had previously shared with the  
20 underlying insurers under a claim of confidentiality. Arrowood may review, evaluate, and utilize  
21 this information in any way it sees fit, but the information is still work product and will be  
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1 shielded from public view.<sup>1</sup>

2 Costco also seeks to file under seal six documents, Exhibits 15, 33, 34, 36, 38, and 51 to  
3 the Declaration of Nicholas Brown (Dkt. # 66), which it argues were prepared for mediation  
4 purposes or are subject to a confidentiality provision in the underlying settlement agreement.  
5 Only Exhibit 15 appears to fall into the first category: it consists of two cover letters transmitting  
6 an August 2013 proposal from the mediator. Costco cites to Cal. Evid. Code § 1119 for the  
7 proposition that all mediation materials and communications are immune from discovery, but  
8 does not explain why that rule would be applicable here. The underlying litigation was a federal  
9 case, as is this one. It appears, therefore, that Fed. R. Ev. 408 provides the governing standard.  
10 Under that rule, settlement discussions are not admissible “either to prove or disprove the  
11 validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a  
12 contradiction . . . .” If Costco is attempting to utilize the mediator’s proposal for one of the  
13 forbidden purposes, it is inadmissible. If it is using the proposal for some other purpose, Rule  
14 408 imposes no bar or limitation. Costco has not justified filing Exhibit 15 under seal.  
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16 Exhibits 33, 34, 36, 38, and 51 are communications between Costco and Arrowood  
17 regarding Costco’s demand for coverage and Arrowood’s analysis and determination of the  
18 request. Exhibit 34, for example, consists of two copies of a reservation of rights letter from  
19 Arrowood dated June 1, 2017, in which Arrowood notifies Costco that certain fees and costs are  
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24 <sup>1</sup> Microsoft Corp. v. Fed. Ins. Co., C01-1815C, 2003 WL 24330082, at \*2 (W.D. Wash. Feb. 14,  
25 2003), does not compel a different result. In that case, the work product of litigation counsel was being  
26 withheld from the insurer that was being asked to pay the fees. Not surprisingly, the Honorable John C.  
27 Coughenour ordered the law firms to produce the documentation supporting their billing invoices. There  
28 is no indication whether those documents would be treated as confidential vis-a-vis third parties or the  
public, which is the issue in this case.

1 not “defense costs” or “losses” covered by the policy, that Costco failed to comply with the  
2 policy’s notice and consent provision, that the attorney’s fees incurred in arbitration are  
3 unreasonable, that Arrowood’s liability is limited by the “Settlement Opportunity” provision of  
4 the policy, and that additional information is needed. Dkt. # 66 at 166-90. In explaining why it  
5 believes the costs associated with the arbitration are unreasonable and not covered by the policy,  
6 Arrowood refers to a settlement amount separately negotiated with one class member and the  
7 cumulative and average attorney’s fees and award amounts incurred (or expected to be incurred)  
8 in arbitration. This information is too general to fall within the confidentiality provision of the  
9 settlement agreement, which applies to the actual “awards” and “award amounts” each claimant  
10 obtained in an arbitral proceeding initiated under the settlement. Dkt. # 64-1 at 46 and 63.  
11 Costco cannot use the confidentiality provision of the settlement agreement to shield all  
12 discussions regarding the expenses and costs of arbitration from public view.  
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16 For all of the foregoing reasons, plaintiff’s motion for leave to file documents under seal  
17 (Dkt. # 61) is GRANTED in part and DENIED in part. In light of the Court’s rulings, the  
18 redactions to the public version of plaintiff’s motion for summary judgment (Dkt. # 62) are too  
19 broad: plaintiff may, within seven days of the date of this Order, file a revised redacted version  
20 consistent with the parameters set forth above. The unredacted exhibits to the Declaration of  
21 Gerald Maatman (Dkt. # 67) shall remain under seal. Because of the way in which the exhibits  
22 were filed, the Clerk of Court is unable to unseal only some of the exhibits attached to the  
23 Declaration of Nicholas Brown. Plaintiff shall, within seven days of the date of this Order, file  
24 an unsealed version of the declaration and Exhibits 15, 33, 34, 36, 38, and 51. Assuming the  
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1 public gets access to an appropriately redacted motion and the non-confidential exhibits through  
2 new filings, Dkt. # 65 and # 66 will remain sealed.<sup>2</sup>  
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5 Dated this 28th day of November, 2018.

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7 Robert S. Lasnik  
8 United States District Judge  
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26 <sup>2</sup> Regardless, Exhibit 54 to the Declaration of Nicholas Brown will remain under seal.  
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